

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

BETTY JACKSON,

Case No.: 2:20-cv-02236-CSD

Plaintiff

**Order**

v.

Re: ECF Nos. 21, 22

KILOLO KIJAKAZI,  
 Acting Commissioner of Social  
 Security Administration,<sup>1</sup>

Defendant

Before the court is Plaintiff's motion for reversal and/or remand. (ECF No. 21. ) The Acting Commissioner filed a cross-motion to affirm and opposition to Plaintiff's motion. (ECF Nos. 22, 23.) Plaintiff filed a reply. (ECF No. 24.)

After a thorough review, Plaintiff's motion is denied, and the Acting Commissioner's cross-motion to affirm is granted.

**I. BACKGROUND**

In November of 2017, Plaintiff completed an application for supplemental security income (SSI) under Title XVI of the Social Security Act, alleging disability beginning on June 15, 2017. (Administrative Record (AR) 170-175.) The applications were denied initially and on reconsideration. (AR 99-102, 107-109.)

Plaintiff requested a hearing before an administrative law judge (ALJ). ALJ Cynthia Hoover held a hearing on February 24, 2020. (AR 30-62.) Plaintiff, who was represented by

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<sup>1</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Under Federal Rule of Civil Procedure 25(d), she is automatically substituted as a party for her predecessor.

1 counsel, appeared and testified on her own behalf at the hearing. Testimony was also taken from  
2 a vocational expert (VE). On May 6, 2020, the ALJ issued a decision finding Plaintiff not  
3 disabled. (AR 12-25.) Plaintiff requested review, and the Appeals Council denied the request,  
4 making the ALJ's decision the final decision. (AR 1-3.)

5 Plaintiff then commenced this action for judicial review under 42 U.S.C. § 405(g).  
6 Plaintiff first argues the final decision arose from an unconstitutional administrative process  
7 because the removal restriction on the Commissioner of the Social Security Administration  
8 (SSA) is unconstitutional. Therefore, Plaintiff alleges relevant agency actions taken during the  
9 Commissioner's tenure were also unconstitutional. As a result, Plaintiff contends she is entitled  
10 to remand for a new hearing and administrative decision. Second, Plaintiff argues that the ALJ  
11 failed to articulate clear and convincing reasons for discounting Plaintiff's subjective complaints.

12 The Acting Commissioner, on the other hand, argues that Plaintiff's separation of powers  
13 argument does not entitle her to a rehearing of her disability claim, and the ALJ properly  
14 discounted Plaintiff's subjective symptom testimony.

## 15 II. STANDARDS

### 16 A. Five-Step Evaluation of Disability

17 Under the Social Security Act, "disability" is the inability to engage "in any substantial  
18 gainful activity by reason of any medically determinable physical or mental impairment which  
19 can be expected to result in death or which has lasted or can be expected to last for a continuous  
20 period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A). A claimant is disabled if his or  
21 her physical or mental impairment(s) are so severe as to preclude the claimant from doing not  
22 only his or her previous work but also, any other work which exists in the national economy,  
23 considering his age, education and work experience. 42 U.S.C. § 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential process for determining whether  
2 a person is disabled. 20 C.F.R. §404.1520 and § 416.920; *see also Bowen v. Yuckert*, 482 U.S.  
3 137, 140-41 (1987). In the first step, the Commissioner determines whether the claimant is  
4 engaged in "substantial gainful activity." If so, a finding of nondisability is made, and the claim  
5 is denied. 20 C.F.R. § 404.152(a)(4)(i), (b); § 416.920(a)(4)(i); *Yuckert*, 482 U.S. at 140. If the  
6 claimant is not engaged in substantial gainful activity, the Commissioner proceeds to step two.

7 The second step requires the Commissioner to determine whether the claimant's  
8 impairment or combination of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c) and  
9 § 416.920(a)(4)(ii), (c); *Yuckert*, 482 U.S. at 140-41. An impairment is severe if it significantly  
10 limits the claimant's physical or mental ability to do basic work activities. *Id.* If the claimant has  
11 an impairment that is severe, the Commissioner proceeds to step three.

12 In the third step, the Commissioner looks at a number of specific impairments listed in  
13 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listed Impairments) and determines whether the  
14 claimant's impairment(s) meets or is the equivalent of one of the Listed Impairments. 20 C.F.R.  
15 § 404.1520(a)(4)(iii), (d) and § 416.920(a)(4)(iii), (d). The Commissioner presumes the Listed  
16 Impairments are severe enough to preclude any gainful activity, regardless of age, education or  
17 work experience. 20 C.F.R. § 404.1525(a), § 416.925(a). If the claimant's impairment meets or  
18 equals one of the Listed Impairments, and is of sufficient duration, the claimant is conclusively  
19 presumed disabled. 20 C.F.R. § 404.1520(a)(4)(iii), (d), § 416.920(a)(4)(iii), (d). If the claimant's  
20 impairment is severe, but does not meet or equal one of the Listed Impairments, the  
21 Commissioner proceeds to step four. *Yuckert*, 482 U.S. at 141.

22 At step four, the Commissioner determines whether the claimant can still perform "past  
23 relevant work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f) and § 416.920(a)(4)(iv), (e), (f). Past

1 relevant work is that which a claimant performed in the last 15 years, which lasted long enough  
2 for him or her to learn to do it and was substantial gainful activity. 20 C.F.R. § 404.1565(a) and §  
3 416.920(a).

4 In making this determination, the Commissioner assesses the claimant's residual  
5 functional capacity (RFC) and the physical and mental demands of the work previously  
6 performed. *See id.*; 20 C.F.R. § 404.1520(a)(4)(v), § 416.920(a)(4)(v); *see also Berry v. Astrue*,  
7 622 F.3d 1228, 1231 (9th Cir. 2010). RFC is what the claimant can still do despite his or her  
8 limitations. 20 C.F.R. § 404.1545 and § 416.945. In determining the RFC, the Commissioner  
9 must assess all evidence, including the claimant's and others' descriptions of the limitations, and  
10 medical reports, to determine what capacity the claimant has for work despite his or her  
11 impairments. 20 C.F.R. § 404.1545(a)(3) and 416.945(a)(3).

12 A claimant can return to previous work if he or she can perform the work as he or she  
13 actually performed it, *i.e.*, if he or she can perform the "actual functional demands and job duties  
14 of a particular past relevant job," or as generally performed, *i.e.*, "[t]he functional demands and  
15 job duties of the [past] occupation as generally required by employers throughout the national  
16 economy." *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation marks and  
17 citation omitted). If the claimant can still do past relevant work, then he or she is not disabled.  
18 20 C.F.R. § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131.

19 If, however, the claimant cannot perform past relevant work, the burden shifts to the  
20 Commissioner to establish at step five that the claimant can perform other work available in the  
21 national economy. 20 C.F.R. §§ 404.1520(e), 416.920(e); *see also Yuckert*, 482 U.S. at 141-42,  
22 144. This means "work which exists in significant numbers either in the region where such  
23 individual lives or in several regions of the country." *Gutierrez v. Comm'r of Soc. Sec. Admin.*,

740 F.3d 519, 528 (9th Cir. 2014). The Commissioner must also consider the claimant's RFC, age, education, and past work experience to determine whether the claimant can do other work. *Yuckert*, 482 U.S. at 141-42. The Commissioner may meet this burden either through the testimony of a VE or by reference to the Grids.<sup>2</sup> *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999).

If the Commissioner establishes at step five that the claimant can do other work which exists in the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566(b), § 416.966(b). Conversely, if the Commissioner determines the claimant is unable to adjust to any other work, the claimant will be found disabled. 20 C.F.R. § 404.1520(g), § 416.920(g); *see also* *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010); *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

### C. Judicial Review & Substantial Evidence

The court must affirm the ALJ's determination if it is based on proper legal standards and the findings are supported by substantial evidence in the record. *Gutierrez*, 740 F.3d at 522 (citing 42 U.S.C. § 405(g)). "Substantial evidence is 'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 523-24 (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012)).

To determine whether substantial evidence exists, the court must look at the record as a whole, considering both evidence that supports and undermines the ALJ's decision. *Gutierrez*,

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<sup>2</sup> "[T]he grids are matrices of the four factors identified by Congress—physical ability, age, education, and work experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010) (internal quotation marks and citation omitted).

740 F.3d at 524 (citing *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The court "may not affirm simply by isolating a specific quantum of supporting evidence." *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007)). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). "If the evidence can reasonably support either affirming or reversing, 'the reviewing court may not substitute its judgment' for that of the Commissioner." *Gutierrez*, 740 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir. 1996)). That being said, "a decision supported by substantial evidence will still be set aside if the ALJ did not apply proper legal standards." *Id.* (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). In addition, the court will "review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely." *Garrison*, 759 F.3d at 1010 (citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

### III. DISCUSSION

#### A. ALJ's Findings in this Case

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since the application date of November 28, 2017. (AR 17.)

At step two, the ALJ concluded Plaintiff had the following severe impairments: degenerative disc disease of the lumbar spine, chronic obstructive pulmonary disease (COPD), and hypertension. (AR 17.)

1 At step three, the ALJ determined Plaintiff did not have an impairment or combination of  
2 impairments that met or medically equaled the severity of one of the Listed Impairments. (AR  
3 19.)

4 At step four, the ALJ assessed Plaintiff as having the RFC to perform light work, except  
5 she can frequently balance and occasionally stoop, kneel, crouch, and climb ramps and stairs.  
6 She is never to crawl or climb ladders, ropes, or scaffolds. She must avoid concentrated exposure  
7 to temperature extremes, pulmonary irritants, and hazards such as unprotected heights and  
8 dangerous moving machinery. (AR 19.)

9 The ALJ then concluded Plaintiff had no past relevant work. (AR 23.)

10 At step five, the ALJ determined, relying on VE testimony, that considering Plaintiff's  
11 age, education, work experience and RFC, there were jobs that exist in significant numbers in the  
12 national economy that Plaintiff could perform, including: Mail Clerk; Marking Clerk; and Ticket  
13 Taker. (AR 24.) As a result, the ALJ found Plaintiff has not been disabled since her application  
14 was filed on November 28, 2017. (AR 24.)

## 15 **B. Separation of Powers**

16 The Commissioner of SSA is appointed for a term of six years (longer than the term of  
17 the President) and may be removed from office by the President for cause ("neglect of duty or  
18 malfeasance in office"). 42 U.S.C. § 902(a)(3).

19 The court takes judicial notice of the fact that Andrew Saul held the office of Social  
20 Security Commissioner from June 17, 2019, until July 9, 2021, during which time the ALJ issued  
21 her decision in this matter and the Appeals Council denied review.<sup>3</sup>

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<sup>3</sup> <https://www.ssa.gov/history/commissioners.html>, last visited March 9, 2022;

1 “The Constitution provides for separate legislative, executive, and judicial branches.”  
2 *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1130 (9th Cir. 2021) (citing U.S. Const. arts. I, II,  
3 III.) Executive power is vested in the President. *Id.* (citing U.S. Const. art. II, § 1, cl. 1). The  
4 Constitution does not contain an explicit clause regarding the President’s power to remove  
5 officers of the United States, but the Supreme Court held in *Myers v. United States*, 272 U.S. 52,  
6 62 (1926), that the President has inherent, exclusive power to do so.

7 In *Seila Law LLC v. CFPB*, 140 S.Ct. 2183 (2020), the Supreme Court held that the  
8 Consumer Financial Protection Bureau’s (CFPB) provision for leadership by a single individual  
9 who is only removable for cause violates the separation of powers because the President has the  
10 power to remove an agency head at-will. 140 S.Ct. at 2197.

11 The Supreme Court subsequently held in *Collins v. Yellin*, that the Federal Housing  
12 Finance Agency’s (FHFA) structure, which also has a single director whom the President can  
13 remove only for cause, violates the separation of powers. *Collins*, 141 S.Ct. 1761, 1783 (2021).  
14 While *Seila* seemed to draw a distinction regarding the unconstitutionality of removal restrictions  
15 for single-head independent agencies that wield “significant executive power,” *Collins* appears to  
16 have abandoned that distinction.

17 On July 8, 2021, the Justice Department’s Office of Legal Counsel (OLC) issued an  
18 opinion that a similar removal restriction for the SSA Commissioner violates the separation of  
19 powers in light of *Seila* and *Collins*. It concluded the President may remove the SSA  
20 Commissioner at will, notwithstanding the statutory removal limitation. “The Constitutionality of  
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1 the Commissioner of Social Security’s Tenure Protection,” 45 Op. O.L.C. \_\_\_, slip op. (July 8,  
2 2021).<sup>4</sup>

3 Acting Commissioner Kijakazi agrees that 42 U.S.C. § 902(a)(3)’s removal restriction  
4 on the SSA Commissioner violates the separation of powers under *Seila* and *Collins*. The Acting  
5 Commissioner argues, however, that conclusion does not support setting aside an unfavorable  
6 SSA disability benefits determination.

7 The court agrees with the parties that 42 U.S.C. § 902(a)(3)’s removal restriction violates  
8 the separation of powers under *Collins* and *Seila*. The court must now turn to Plaintiff’s  
9 requested remedy: reversal and remand for a new hearing and decision. *See Seila*, 140 S.Ct. at  
10 2207 (“Having concluded that the CFPB’s leadership by a single independent Director violates  
11 the separation of powers, we now turn to the appropriate remedy.”).<sup>5</sup>

12 Plaintiff argues that the Commissioner delegates authority to the ALJ and Appeals  
13 Council, and their actions denying Plaintiff’s claim for disability benefits were completed within  
14 the unconstitutional tenure of Commissioner Saul. Plaintiff contends that because of the  
15 unconstitutional removal provision, Saul had no authority to delegate to the ALJ or Appeals  
16 Council in this case. (ECF No. 21 at 7.)

17 The plaintiff shareholders in *Collins* similarly sought an order setting aside the third  
18 amendment that was at issue in that case, asserting that it “was adopted and implemented by  
19 \_\_\_\_\_

<sup>4</sup> *See*

20 [https://www.justice.gov/olc/file/1410736/download#:~:text=In%20that%20decision%2C%20the%20Court,5491\(c\)\(3\),](https://www.justice.gov/olc/file/1410736/download#:~:text=In%20that%20decision%2C%20the%20Court,5491(c)(3),) last visited March 9, 2022.

21 <sup>5</sup> Plaintiff does not argue that the entirety of the legislation governing SSA is unconstitutional.  
22 Under *Seila*, it appears the unconstitutional removal restriction is severable from the remainder  
23 of the provisions. *See Seila*, 140 S.Ct. at 2209-2211. The OLC opinion likewise concludes that  
the removal restriction does not affect the validity of the remainder of the provisions. “The  
Constitutionality of the Commissioner of Social Security’s Tenure Protection,” 45 Op. O.L.C.  
\_\_\_, slip op. (July 8, 2021) (citing *Seila*, 140 S.Ct. at 221).

1 officers who lacked constitutional authority and that their actions were therefore void *ab initio*.”  
2 *Collins*, 141 S.Ct. at 1787.

3 *Collins* concluded that there was “no reason to regard any of the actions taken by the  
4 FHFA in relation to the third amendment as void” because “[a]ll the officers who headed the  
5 FHFA during the time in question were properly *appointed*.” *Collins*, 141 S.Ct. at 1787  
6 (emphasis original). While “the statute unconstitutionally limited the President’s authority to  
7 remove the confirmed Directors, there was no constitutional defect in the statutorily prescribed  
8 method of appointment to that office.” *Id.*

9 Plaintiff relies on *Lucia v. SEC*, 138 S.Ct. 2044, 2055 (2018), to support the argument  
10 that the actions of the agency are constitutionally defective when they have been completed  
11 under unconstitutional authority. (ECF No. 21 at 7.) In *Lucia*, the plaintiff challenged an  
12 administrative proceeding of the Securities and Exchange Commission (SEC) before an ALJ on  
13 grounds the ALJ was unconstitutionally *appointed* in violation of the Appointments Clause. The  
14 Supreme Court agreed. The ALJ had been appointed by *SEC* staff members, but the  
15 Appointments Clause required that ALJs had to be appointed by the President, a court of law, or  
16 the head of a department. *Luca*, 138 S.Ct. at 2050-52. The appropriate remedy in that case was a  
17 new hearing before a properly *appointed* ALJ. *Id.* at 2055.

18 This case is distinguishable from *Lucia*. Here, like *Collins*, but unlike *Lucia*, while the  
19 statute at issue may unconstitutionally limit the President’s power to *remove* the Commissioner,  
20 there is no asserted defect in the Commissioner’s *appointment*, and thus, “no reason to regard  
21 any of the actions taken by the [SSA in relation to Plaintiff’s disability determination] as void.”  
22 *Collins*, 141 S.Ct. at 1787. As the Court pointed out in *Collins*, *Lucia* involved an “exercise of  
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1 power that the [Government] actor did not lawfully possess,” *Collins*, 141 S.Ct. at 1788  
2 (citations omitted), but that is not the case here.

3 Like *Collins*, the court similarly finds that the existence of the unconstitutional removal  
4 provision alone does not justify the remedy Plaintiff seeks here. *See Decker*, 8F.4th at 1137  
5 (noting that *Collins* is “controlling with respect to the remedy for any unconstitutional provision  
6 in the removal provisions” and the Supreme Court found undoing the agency action on the basis  
7 of the unconstitutional removal provision was unwarranted).

8 While the Supreme Court found there was no reason for the third amendment to be  
9 completely undone in *Collins*, it acknowledged “[t]hat does not necessarily mean ... that the  
10 shareholders have no entitlement to retrospective relief.” *Id.* “[I]t is still possible for an  
11 unconstitutional provision to inflict compensable harm. And the possibility that the  
12 unconstitutional restriction on the President’s power to remove a Director of the FHFA could  
13 have such an effect cannot be ruled out.” *Id.* The court gave two examples of when this might be  
14 the case:

15 Suppose, for example, that the President had attempted to remove a  
16 Director but was prevented from doing so by a lower court  
17 decision holding that he did not have ‘cause’ for removal. Or  
18 suppose that the President had made a public statement expressing  
19 displeasure with actions taken by a Director and had asserted that  
20 he would remove the Director if the statute did not stand in the  
21 way. In those situations, the statutory provision would clearly  
22 cause harm.

23 *Id.* at 1789.

The Court remanded for the lower court to resolve whether the “unconstitutional removal  
provision inflicted harm” *Id.*

In *Decker*, the Ninth Circuit subsequently confirmed that “the key ... is demonstrating  
that the unconstitutional provision actually caused the plaintiff harm.” *Decker*, 8 F.4th at 1137

1 (citing *Collins*, 141 S.Ct. at 1788-89). The Ninth Circuit concluded that “[a]bsent a showing of  
2 harm, we refuse to unwind the decisions below.” *Id.*

3 In her reply brief, Plaintiff argues that the delay of several months between the OLC’s  
4 opinion and the termination of Saul *suggests* that the President believed he could not remove  
5 Saul. Plaintiff’s reply also references a statement (that Plaintiff attributes to the President) that  
6 Saul undermined and politicized Social Security disability benefits, reduced due process  
7 protections, and took other actions contrary to SSA’s mission. (ECF No. 24 at 7:13-16.) Plaintiff  
8 cites a news article as the source for this statement. (ECF No. 24 at 7, n. 1.)

9 Plaintiff’s speculation about the delay between the OLC memo and Saul’s termination  
10 does not come close to the example of specific harm the Supreme Court discussed in *Collins*.

11 Plaintiff attributes a statement of displeasure with Saul to the President. However, the  
12 new article indicates the statements came from an unidentified White House Official.<sup>6</sup> Plaintiff  
13 has not presented evidence that the *President* expressed his displeasure with Saul, or that the  
14 *President* said he would remove Saul if the statute did not stand in his way. Nor has Plaintiff  
15 cited a lower court case that blocked the President’s removal of Saul.

16 Moreover, Plaintiff does not identify a particular due process violation that had an effect  
17 on her disability determination. Instead, she argues “[t]here is a strong *possibility* that Jackson  
18 was among those who were wrongfully deprived of their due process rights[.]” (ECF No. 24 at  
19 8:17-18, emphasis added.) Plaintiff does not provide evidence of any link between the  
20 unconstitutional removal provision and her unfavorable disability determination. *See Decker*, 8  
21 F.4th at 1138 (declining to reverse an administrative level decision when there was “no link  
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23 <sup>6</sup> See <https://www.cnn.com/2021/07/09/politics/social-security-commissioner-fired-by-biden/index.html>, last visited March 9, 2022.

1 between the ALJ's decision awarding benefits and the allegedly unconstitutional removal  
2 provisions.").

3 In sum, the court finds Plaintiff's proffer of harm is simply too tenuous.

4 For the first time in her reply, Plaintiff argues that "two-layered removal" adds another  
5 constitutional defect.

6 It is inappropriate to raise an argument for the first time in a reply brief. *See Cedano-*  
7 *Viera v. Ashcroft*, 324 F.3d 1062, 1066 n. 5 (9th Cir. 2003) (citing *Thompson v. Commissioner*,  
8 631 F.2d 642, 649 (9th Cir. 1980)); *Bazuze v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (citing  
9 *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)). Moreover, even if this argument  
10 was raised initially, Plaintiff provides no explanation as to why two-layer removal is  
11 unconstitutional here. Plaintiff cites *Decker Coal Company v. Pehringer*. However, the Ninth  
12 Circuit held in *Decker* that a two-layer tenure protection scheme was constitutional as applied to  
13 Department of Labor (DOL) ALJs. *Decker*, 8 F.4th at 1136.<sup>7</sup>

14 *Decker* said even if the court concluded the two-layer protection was unconstitutional, it  
15 would only sever one layer of that protection. *Id.* (citing *Seila*, 140 S.Ct. at 2209-11). It "would  
16 not, however, invalidate the decision reached below." *Id.* "[W]e simply cannot conclude that the  
17 existence of [the two-layer protection] alone tainted the ALJ's decision." *Id.* at 1337. If the court  
18 accepted the plaintiff's argument that the two-layer protection was unconstitutional, "it would  
19 have potentially catastrophic effects on numerous past and ongoing claim adjudications under  
20 various benefits programs administered throughout the federal government." *Id.* Notwithstanding

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22 <sup>7</sup> The two-layer removal system described in *Decker* is this: ALJs can be removed for "good  
23 cause established and determined by the Merit Systems Protection Board [MSPB] on the record  
after opportunity for hearing before the Board." 5 U.S.C. § 7521(a), (b). A member of the  
MSPB, in turn, may be "removed by the President only for inefficiency, neglect of duty, or  
malfeasance in office." 5 U.S.C. § 1202.

1 those practical implications, the court found there was “no link between the ALJ’s decision  
2 awarding benefits and the allegedly unconstitutional removal provisions.” *Id.* at 1138.

3 In conclusion, the court finds Plaintiff did not properly present an argument that two-  
4 layer protection is unconstitutional here. And even if she had, Plaintiff has not presented any link  
5 between the decision to deny benefits by the ALJ and the Appeals Council and the asserted  
6 unconstitutional removal provisions. Therefore, there is no basis to reverse and remand the  
7 disability determination for a new hearing.

8 In light of the court’s conclusion, it need not reach the Acting Commissioner’s remaining  
9 arguments on this issue. Having found that the disability determination need not be reversed and  
10 remanded on the basis of the separation of powers violation, the court must next determine  
11 whether the ALJ erred in adjudicating Plaintiff’s claim for benefits.

## 12 **C. Plaintiff’s Subjective Symptom Testimony**

### 13 **1. Standard for Evaluating Subjective Symptom Testimony**

14 Evaluating a claimant’s subjective symptom testimony “becomes important at the stage  
15 where the ALJ is assessing residual functional capacity, because the claimant’s subjective  
16 statements may tell of greater limitations than can medical evidence alone.” *Tonapetyan v.*  
17 *Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001) (citing Social Security Ruling (SSR) 96-7P)).<sup>8</sup>

18 “Such testimony is inherently subjective and difficult to measure.” *Coleman v. Saul*, 979  
19 F.3d 751, 755-56 (9th Cir. 2020). This evaluation is often crucial to a finding of disability. *Id.*  
20 (citing *Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir. 1989)).

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22 <sup>8</sup> SSA previously referred to this as a credibility determination. SSR 96-7P. SSA subsequently  
23 eliminated use of the term “credibility.” SSA has clarified that “subjective symptom evaluation is  
not an examination of an individual’s character.” Instead, the adjudicator considers all of the  
evidence in evaluating the intensity and persistence of a claimant’s symptoms. SSR 16-3P.

1 There is a two-step test for evaluating a claimant's subjective symptom testimony:

2 First, the ALJ must determine whether the claimant has presented objective  
3 medical evidence of an underlying impairment which could reasonably be  
4 expected to produce the pain or other symptoms alleged. In this analysis, the  
5 claimant is *not* required to show that her impairment could reasonably be  
6 expected to cause the severity of the symptom she has alleged; she need only  
7 show that it could reasonably have caused some degree of the symptom. Nor must  
8 a claimant produce objective medical evidence of the pain or fatigue itself, or the  
9 severity thereof.

10 If the claimant satisfies the first step of this analysis, and there is no evidence of  
11 malingering, the ALJ can reject the claimant's testimony about the severity of her  
12 symptoms only by offering specific, clear and convincing reasons for doing so.  
13 This is not an easy requirement to meet: The clear and convincing standard is the  
14 most demanding required in Social Security cases.

15 *Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014) (internal quotation marks and  
16 citations omitted, emphasis original).

17 An ALJ may consider various factors in evaluating the allegedly disabling subjective  
18 symptoms, including: daily activities; the location, duration, frequency, and intensity of pain or  
19 other symptoms; precipitating and aggravating factors; the type, dosage, effectiveness, and side  
20 effects of any medication taken to alleviate symptoms; treatment, other than medication, received  
21 for relief of symptoms; any measures a claimant has used to relieve symptoms; and other factors  
22 concerning functional limitations and restrictions due to pain or other symptoms. 20 C.F.R. §  
23 404.1529(c), § 416.929(c); SSR 16-3P.

## 2. Plaintiff's Testimony

24 At the time of the hearing, Plaintiff was 51 years old and was living with her oldest  
25 daughter and her family. (AR 34-35.)

26 She reports her back pain wakes her up at night, and she has had to call an ambulance  
27 because she cannot move at all. (AR 45.) She has numbness in her left leg and right thigh. (AR  
28 46.) She experiences spasms, for which she goes to the hospital to get a shot. (AR 47.) She had

1 some injections in her back, but only had relief for a few days. (AR 40-41, 48.) She takes pain  
2 medications for her back, which sometimes take her pain away, though they cause her to feel  
3 “woozy.” (AR 40, 49.)

4 She also has pain in her hips that is worse on the right. This occurs when she sits or walks  
5 for too long. (AR 49.) She has not had any treatment for her hips, other than pain medication.  
6 (AR 50.)

7 She has chronic obstructive pulmonary disease (COPD) and cannot be around chemicals.  
8 She has been trying to quit smoking, but at the time of the hearing, she was smoking five to six  
9 cigarettes a week. The COPD causes shortness of breath when walking up or down stairs or if  
10 she walks too far. She uses three inhalers. (AR 51-52.) She also has high blood pressure. (AR  
11 58.)

12 She reports that she cannot bend or stoop. (AR 46.) She can sit for about 30 minutes but  
13 has to keep moving back and forth because of her back pain. (AR 53-55.) She can stand for about  
14 30 minutes, but if she stands for too long, her right hip will hurt. (AR 55.) After standing for that  
15 long, she will try to walk a little or find somewhere to sit. It will take about 10-15 minutes before  
16 she can get back into standing position again. (AR 55-56.) She was unsure how much weight she  
17 could lift, but said she would have difficulty lifting with her left arm because she has pins in that  
18 arm from her shoulder to her elbow and from her elbow to her wrist. (AR 58.)

19 She is able to cook a little bit. She testified that her family takes care of the dishes,  
20 laundry and grocery shopping. However, she stated in her adult function report that she feeds  
21 her grandchildren, does her own laundry and some dishes, and shops for personal things once a  
22 month. She watches movies with her sisters and goes out to play bingo. She goes to church  
23 occasionally with her daughter. Every once in a while, she will braid hair. She watches

1 television, helps her grandchildren with books or puzzles. (AR 42-44, 196-198.) She can get  
2 dressed while sitting down; otherwise, her granddaughter will help her. (AR 47.)

### 3 **3. Analysis**

4 The ALJ found that Plaintiff's medically determinable impairments could reasonably be  
5 expected to cause the alleged symptoms. However, the ALJ found Plaintiff's statements  
6 concerning the intensity, persistence and limiting effects of these symptoms were not entirely  
7 consistent with the medical evidence and other evidence in the record. (AR 20.) Therefore, the  
8 court must determine whether the ALJ set forth specific, clear and convincing reasons for  
9 discounting Plaintiff's subjective symptom testimony.

#### 10 **a. Noncompliance with Treatment**

11 The ALJ found that Plaintiff's medical records showed evidence of noncompliance with  
12 treatment. On December 28, 2018, she was discharged from pain management for  
13 noncompliance. Her pain management doctor noted that three times in the last year, he had  
14 referred her for a lumbar spine evaluation, which continually got rescheduled. The ALJ found  
15 this noncompliance undermined the persuasiveness of the allegations, because if an individual  
16 was as debilitated as alleged, the person would follow doctor's orders, hoping for improvement  
17 or relief. (AR 21.)

18 The ALJ also mentioned that Plaintiff's doctors regularly discussed smoking cessation  
19 with her as well as the risks of smoking, but Plaintiff testified that she continued to smoke. The  
20 ALJ found this undermined the persuasiveness of Plaintiff's allegations. Nevertheless, this  
21 condition was accounted for in the RFC. (AR 21.)

22 Plaintiff argues the ALJ did not fully develop the record by asking Plaintiff why she was  
23 not compliant with treatment.

1 “A claimant’s subjective symptom testimony may be undermined by an ‘unexplained, or  
 2 inadequately explained, failure to ... follow a prescribed course of treatment. While there are any  
 3 number of good reasons for not doing so, a claimant’s failure to assert one, or a finding by the  
 4 ALJ that the proffered reason is not believable, can cast doubt on the sincerity of the claimant’s  
 5 pain testimony.’” *Trevizo v. Berryhill*, 871 F.3d 664, 679-80 (9th Cir. 2017) (quoting *Fair v.*  
 6 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). Both *Trevizo* and *Fair* place the onus on the claimant  
 7 to proffer a reason for failing to follow the prescribed course treatment. Plaintiff has not done so  
 8 here. Therefore, the court finds this is a specific, clear and convincing reason for discounting  
 9 Plaintiff’s subjective symptom statements.

#### 10 **b. Improvement with Medication**

11 The ALJ said that Plaintiff’s doctor noted her medications were providing benefit and  
 12 allowed her to function at a higher level. Plaintiff also reported her pain was controlled by, and  
 13 relieved with, medication. Her doctors noted they prescribed her medications because she  
 14 continued to obtain pain relief with minimal side effects using those medications. (AR 21.)

15 Plaintiff argues that the record does not reflect that Plaintiff was symptom free while  
 16 taking her medications.

17 The ALJ does not state that Plaintiff was symptom free while taking her medication. The  
 18 ALJ pointed out that Plaintiff was still experiencing symptoms, while also noting that her  
 19 medications provided a benefit, relieved some of her pain, and allowed her to function at a higher  
 20 level. This is consistent overall with the medical records. Between 2016 and 2018, Plaintiff  
 21 reported 35%, 40 %, 65% and 75% pain relief, and her provider continually indicated that she  
 22 had relief with minimal side effects. (AR 288-91, 292-94, 296-98, 303, 305-07, 310, 313-15,  
 23 379, 375-78, 381, 466, 475-78, 479-81, 483-86, 488-91, 492-95, 499.) There are also notations

1 that muscle relaxers helped her (AR 420) and that her COPD was controlled with her inhalers  
2 (AR 353).

3 The court finds this to be a clear and convincing reason for discounting Plaintiff's  
4 subjective symptom testimony.

5 **c. Objective Medical Evidence**

6 The ALJ found that Plaintiff's subjective symptom testimony was not supported by the  
7 objective medical evidence.

8 Plaintiff argues this cannot be the sole reason for discounting Plaintiff's testimony.

9 The ALJ noted that imaging failed to establish limitations beyond those assessed in the  
10 RFC and discussed each of the imaging findings. In addition, the ALJ said that physical exam  
11 findings did not corroborate Plaintiff's allegations of disability. The ALJ said the notes  
12 documented that Plaintiff exhibited tenderness to palpation of the lumbar spine, decreased range  
13 of motion of the lumbar spine, pain with facet loading, and positive straight leg raise test  
14 bilaterally. However, Plaintiff also had normal sensation, reflexes and strength in the bilateral  
15 lower extremities. Her gait was steady. The ALJ found these findings supported the limitations in  
16 the RFC to a light exertional level with additional postural limitations. The ALJ also discussed  
17 that Plaintiff's records generally documented normal respiratory findings with respect to her  
18 COPD.

19 Plaintiff is correct that an ALJ "may not discredit the claimant's subjective complaints  
20 *solely* because the objective evidence fails to fully corroborate the degree of pain alleged."  
21 *Coleman*, 979 F.3d at 756 (emphasis added, citing *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.  
22 1998)); *see also Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2011). Here, the ALJ did not  
23 discount Plaintiff's subjective symptom testimony based *solely* on the objective medical

evidence. The court has found that the ALJ gave other clear and convincing reasons, including her noncompliance and improvement with medications. Therefore, this also qualifies as a clear and convincing reason for the ALJ's subjective symptom testimony determination.

#### **d. Daily Activities**

Finally, the ALJ said Plaintiff described daily activities are not limited to the extent one would expect given her complaints of disabling symptoms. The ALJ noted that Plaintiff helped care for grandchildren with things including feeding and dressing them; she spent time with her grandchildren watching television, reading books and doing puzzles; she washed dishes, she did her own laundry, she prepared meals and shopped for groceries; she went to her sister's house to watch movies and went out to play bingo; and she occasionally went to church and braided hair. (AR 22.)

Plaintiff argues that the ALJ failed to adequately explain how Jackson's activities translate into the ability to perform work full time on a sustained basis.

"Engaging in daily activities that are incompatible with the severity of symptoms alleged can support an adverse credibility determination." *Ghanim v. Colvin*, 763 F.3d 1154, 1165 (9th Cir. 2014) (citations omitted). This is if "a claimant is able to spend a substantial part of his day engaged in pursuits involving the performance of physical functions that are transferable to a work setting." *Id.* (citation and quotation marks omitted). A claimant need not be "utterly incapacitated to be eligible for benefits, and many home activities may not be easily transferable to a work environment where it might be impossible to rest periodically or take medication." *Smolen*, 80 F.3d at 1287 n. 7; *see also Fair*, 885 F.2d at 603. House chores, cooking simple meals, and occasional shopping are not similar to typical work responsibilities. *Diedrich v. Berryhill*, 874 F.3d 634, 643 (9th Cir. 2017). "Recognizing that 'disability claimants should not

1 be penalized for attempting to lead normal lives in the face of their limitations,’ we have held  
 2 that ‘[o]nly if [her] level of activity were inconsistent with [a claimant’s] claimed limitations  
 3 would these activities have any bearing on [her] credibility.’” *Garrison v. Colvin*, 759 F.3d 995,  
 4 1016 (9th Cir. 2014) (quoting *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)).

5 The ALJ did not describe how Plaintiff’s ability to engage in these limited activities is  
 6 transferable to a work setting, or specifically explain how these activities were inconsistent with  
 7 her claimed limitations. Therefore, the ALJ erred on this issue.

8 The error, however, is harmless because the ALJ set forth other clear and convincing  
 9 reasons for discounting Plaintiff’s subjective symptom testimony, and the ultimate credibility  
 10 determination is adequately supported by substantial evidence in the record. *See Carmickle v.*  
 11 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (citing *Batson v. Comm’r Soc.*  
 12 *Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)). Here, as in *Carmickle* and *Batson*, the ALJ  
 13 considered Plaintiff’s testimony and provided other specific reasons for discounting her  
 14 subjective symptom testimony. In addition, the ALJ did not completely reject Plaintiff’s  
 15 allegations, but instead found the alleged extent of her statements inconsistent with other  
 16 evidence in the record, and the ALJ took her symptoms into account in determining her RFC.

#### 17 **4. Conclusion on Subjective Symptom Testimony**

18 The ALJ set forth several clear and convincing reasons for discounting Plaintiff’s  
 19 subjective symptom testimony; therefore, Plaintiff’s motion for reversal and/or remand on this  
 20 basis is denied, and the Acting Commissioner’s cross-motion to affirm is granted.

21 / / /

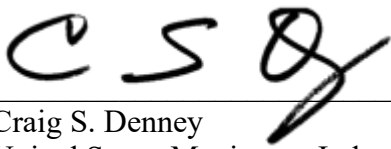
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23 / / /

**IV. CONCLUSION**

Plaintiff's motion for reversal and/or remand (ECF No. 21) is **DENIED**, and the Acting Commissioner's cross-motion (ECF No. 22) is **GRANTED**. The Clerk shall enter **JUDGMENT** accordingly. **IT IS SO ORDERED.**

Dated: March 10, 2022



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Craig S. Denney  
United States Magistrate Judge